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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 31—File No. 35709.

Magno Santovincenzo, Consul of the Kingdom of Italy at New York,

Appellant,

vs.

James F. Egan, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Antonio Comincio, deceased, and John J. Bennett, Jr., Attorney General of the State of New York,

Appellees.

BRIEF OF APPELLEE, THE ATTORNEY GENERAL OF THE STATE OF NEW YORK.

John J. Bennett, Jr.,
Attorney General of the State of New York,
Appellee.

Robert P. Beyer,
Deputy Assistant Attorney General of the State of New York,
Counsel for Appellee.

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TEXT BOOK.

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IN THE

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In the Matter
of
The Judicial Settlement of the Account of Proceedings of the Public Administrator of the County of New York, Administrator of the Goods, Chattels and Credits of Antonio Comincio, deceased.

Magno Santovincenzo, Acting Consul General of Italy at New York,

Appellant,

James F. Egan, Public Administrator of the County of New York, as Administrator of the Estate of Antonio Comincio, deceased, and John J. Bennett, Jr., Attorney General of the State of New York,

Appellees.

BRIEF FOR APPELLEES, THE ATTORNEY GENERAL OF THE STATE OF NEW YORK.

Statement of Facts.

This is an appeal from a decree of the Surrogate's Court of the County of New York entered July 3rd, 1929, on the judicial settlement of the account of James F. Egan, the Public Administrator of the County of New York, as

Administrator of the Estate of Antonio Comincio, deceased, directing that the net assets remaining for distribution be paid into the treasury of the City of New York, for the benefit of the unknown next of kin of said decedent.

Antonio Comincio, the decedent, was born in Italy (fol. 73) of unknown parents (page 18). He came to New York about the year 1890 (page 18), and with the exception of one visit to Italy about the year 1898, when he stayed away for several months (pages 19, 20), he continued to reside at No. 365 East 76th street, in the City of New York, down to the time of his death, on January 5, 1929, having lived in the same house for more than twenty-five years (page 21). Decedent about 1924 said, "I have no one in Italy, why should I go to Italy?", but said he would retire and return back to Italy if his friend Speranzo would go with him (page 21). But Speranzo said he did not want to go back and decedent said, "You won't go, neither will I." (page 22).

The Consul General of Italy at New York, in his official capacity, made claim to the net assets in the estate, upon two grounds: first, that the decedent's domicile of origin had not been changed at the time of his death, and that the Law of the Kingdom of Italy, should, therefore, apply in the distribution of the estate; and second, that said Consul General of Italy is entitled to receive the said assets by virtue of the provisions of treaties between the United States and the Kingdom of Italy, and the United States and the Kingdom of Persia (answer, page 6).

The Surrogate, below, overruled both contentions and decreed that the balance of the estate be paid into the Treasury of the City of New York for the benefit of unknown next of kin (page 3).

An Appeal was taken by the Italian Consul from the decree judicially settling the account of the Public Admin-

istrator of New York County to the Appellate Division of the New York Supreme Court, First Judicial Department, which said court affirmed said decree (page 26). Thereafter said consul made application for leave to appeal further to the Court of Appeals of the State of New York, which said court denied said application and refused to review the case (page 28). Thereupon said counsel appealed to this court, praying for reversal and contending that the statutes of the State of New York providing for the disposition of the decedent's estate as made by the Surrogate were in contravention of the treaties of the United States affecting the Kingdom of Italy (page 33).

POINT I.

The domicile of this decedent was in the State of New York.

The decedent was an illegitimate child; he had no blood relations; no kith or kin, and he was never married. He came to New York in or about the year 1890 and engaged in the business of vegetable peddling, which pursuit he followed to the time of his death. The decedent resided continuously in New York City for this period of thirty-five (35) years, excepting for several months in 1898 which he spent on a visit to his native country. At the time of his death he lived at No. 365 East 76th street, Manhattan, which had been his home continuously for over twenty-five (25) years. Under these circumstances, it is evident that the deceased made his home in his adopted country for the entire thirty-five (35) years that elapsed since he left his native Italy. That he regarded New York as his home is evidenced by the conversation with his friend Speranzo:

"Q. Did he ever tell you that America was his country now? A. He said: 'I have no one in Italy; why should I go to Italy?' However, he expressed an intention to go to Italy if I would go with him, but I had my family here and we did not go.

Q. When he wanted to go to Italy it was merely for a visit? A. He said: 'I have $2,000; I wanted to retire and return back to Italy if you will come with me.'

Q. Only for a visit? A. Sure, to retire.

By the Surrogate:

Q. You did not want to go back? A. I have my family here. I did not want to go.

Q. Did you tell him that? A. Yes.

Q. What did Comincio say? A. He said: 'You won't go, neither will I.'

Q. When was that? A. About five years ago."

When is a domicil of origin changed to one of choice? In the famous case involving the domiciliatory status of General Kosciusko, this Court answered this question in an opinion which has been universally followed. The Court there (Ennis v. Smith, 55 U. S. 399, at page 422) says:

"But what amount of proof is necessary to change a domicil of origin into a *prima facie* domicil of choice? It is residence elsewhere, or where a person lives out of the domicil of origin. That repels the presumption of its continuance, and casts upon him who denies the domicil of choice the burden of disproving it. Where a person lives is taken *prima facie* to be his domicil, until other facts establish the contrary. It is difficult to lay down any rule under which every instance of residence could be brought, which may make a domicil of choice. But there must be to constitute it, actual residence in the place, with the intent that it is to be a principal and permanent residence. That intent may be inferred from the circumstances or conditions in which a person may be as to the domicil of his origin, or from

the seat of his fortune, his family and pursuits of life. A removal which does not contemplate an absence from the former domicil for an indefinite and uncertain time is not a change of it. But when there is a removal, unless it can be shown, or inferred from circumstances, that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, office or calling, it does change the domicil. The result is that the place of residence is *prima facie* the domicil, unless there be some motive for the residence not inconsistent with a clearly established intent to retain a permanent residence in another place."

"Domicile" was defined by this Court in Mitchell vs. United States, 88 U. S. 350, 352, as follows:

"A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. This definition is approved by Phillmore in his work on the subject. By the term *domicile*, in its ordinary acceptation, is meant the place where a person lives and has his home. The place where a person lives is taken as his domicile unless facts adduced establish the contrary."

In Williamson vs. Osenton, 232 U. S. 619, this Court stated:

"The very meaning of domicile is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined."

In Matter of Newcomb, 192 N. Y. 238, at page 250, the Court said:

"The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals."

Professor Moore, in his Digest of International Law, defines one's domicile as his "permanent home," and cites with approval from Guier v. O'Daniel, 1 Binney, 349, that

> "Domicil is defined as a residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time."

Likewise, in a famous case, the Supreme Court of Massachusetts in (McConnell v. Kelley, 138 Mass. 372) said:

> "In determining whether there has been such a change from one place to another, the test is to inquire whether he has in fact removed his home to the latter place with the intention of making it his residence permanently, or for an indefinite time. If he has, he loses his old domicil, and acquires a new one with all its rights and incidents."

In The Venus, 12 U. S. 253, 279, this Court speaking on this subject, said:

> "A person who removes to a foreign country, settles there, and engages in the trade of the country, furnishes by these acts such evidence of an intent permanently to reside there as to stamp him with the national character of the state where he resides."

That the decedent remained an Italian subject, failing to complete citizenship here (fol. 93), is immaterial.

In re: Mesa v. Hernandez, 87 N. Y. Misc. 242, at page 252, we read:

> "Citizenship and nationality and domicile involve different principles. A citizen of any country may retain his citizenship in that country and yet have his last domicile out of that country."

Professor Moore expresses the idea in his Digest of International Law (Vol. 3 at page 811) thus:

> "By the person's domicil is meant, generally speaking, his permanent home. It is the criterion in English and American Law of civil as distinguished from political status. The case is the same in the law of other countries, though not of all. In Italy, for example, civil status follows the political."

Appellant's reliance on Dupuy v. Wurtz, 53 N. Y. 556, does not aid him. There, it appeared clearly from the decedent's repeated expressions on the subject, that she in fact had no desire or intention to change her domicil but continuously expressed her love for the United States and planned to return to her native country, until the condition of her health made this impossible. The distinction between the facts of that case and those of the instant case is so marked as to call for no further comment.

The record at bar amply sustains the conclusion of the learned surrogate that this decedent's "intention to abandon his domicile of origin and to establish and maintain a domicile in this country is clearly established by the evidence" (fol. 34, page 23).

POINT II.

The established rule that succession to personalty follows the law of the domicile is not affected by the Persian treaty.

That the distribution of a decedent's estate is governed by the law of his domicile is so well settled, as appellant's counsel concedes, as "to require no citation of authorities." The courts of all states have unfailingly given their ap-

proval to the famous pronouncement of this Court, in Ennis v. Smith, *supra* (55 U. S., at page 424):

> "For several hundred years upon the continent, and in England, from reported cases, for a hundred years, the rule has been that personal property in case of intestacy is to be distributed by the law of the domicile of the intestate at the time of his death. It has been universal for so long a time that it may now be said to be a part of the '*jus gentium.*'"

Appellant here claims that this doctrine, so universally recognized in our jurisprudence, must be deemed to have been abandoned in favor of Persian subjects, because of the provisions of the Persian treaty of 1857, and in favor of the nationals of all other countries, including Italy, whose treaties with us contain the "most favored nation" clause. Appellant insists that the Persian treaty, never before invoked by any foreign power possessing "most favored nation" rights, must "prevail" over this basic tenet of our substantive law. And appellant here demands that the personalty of this decedent pass, not to the New York City Treasury, pending ascertainment of the persons entitled thereto, as the New York law requires, but to the Italian Consul for disposition, to-wit: State confiscation, pursuant to Italian procedure.

Whether the treaty-making power may constitutionally be so exercised as to supplant, or even qualify the commonwealth laws regulating the administration of estates was left open to question by the New York Court of Appeals in Matter of D'Adamo (212 N. Y. 214), although the court cites, and without disapproval, the opinions of various Secretaries of State disclaiming the existence of such a power (212 N. Y. at pages 227-228). Nor is that question here involved. The construction of the Persian statute, here sought, is so subversive of our settled law, that:

"It is not to be lightly presumed that the government of the nation departed from the precedents of a century, and by an obscure clause in a long and involved article of this convention, overturned its settled practice" (212 N. Y. at page 228).

The treaty, under consideration at bar, so far as is here pertinent, provides (in language whose obscure meaning will be hereinafter considered) that upon the death in the United States of a Persian national "his effects shall be delivered up *integrally* to the family or partners in business of the deceased"; lacking such, the effects shall be delivered to the Persian Consul, "so that he may dispose of them in accordance with the laws of his country."

Appellant here contends that this convention must be deemed to apply to all Persian nationals, whether or not domiciled in the United States at the time of their death. Such interpretation would involve strange consequences. It is incredible that the treaty would operate to prevent a Persian alien, after establishing here a prosperous business, from making such testamentary disposition of his property as our law approves, merely because he lacked a family or business partners. Similar comment was made in the D'Adamo case, where the court had under consideration the Swedish treaty which was claimed by the Italian Consul as entitling him to priority in the administration of the effects of Italian nationals dying here, superior to that granted by our law. Judge Cardozo, in pointing out the absurdity of the Italian contention on this point, observed (212 N. Y. at page 226):

"If the convention means more than this, if it was intended to confer upon foreign consuls an exclusive and paramount right, strange consequences must follow. It is not restricted in its operation to the estates

of aliens who have died in the United States while temporarily sojourning here but who have retained a domicile in their native lands. It applies equally to the estates of aliens who have their domicile in the United States. If an alien, settling in New York, were to build up a business, and, marrying, rear a family among us, the respondent would have us hold that his children, citizens of this state, would have to yield the right of administration to a foreign consul. In that view, the consul is not only eligible as administrator, but eligible to the exclusion of every one else, even the closest relatives of the dead man, and that too, though the entire estate is located here, and is here to be distributed. We are unwilling to believe that such results were contemplated in concluding the convention. We hold it to be incredible that there has been attached to the consular office a right that exceeds so greatly the occasion and the needs of the consular function. Before adopting a construction that will bring these consequences to pass, we have a right to expect a far plainer manifestation of the will of the national government than any that has been afforded by the language now before us. The construction that we thus hold to be the true one finds additional confirmation when we consider the respective fields of state and national legislation, and the refusal of the federal government, as disclosed in our diplomatic history, to trench upon the rights of the states to administer the estates of those dying within their territorial limits."

The conclusion is irresistible that the Persian treaty was designed to apply, and must be so construed as applying, only to *derelict estates*, as such. The reasoning of the D'Adamo case applies here again with surprising aptness:

"This construction is confirmed when we consider that it harmonizes the functions of consuls under the treaty with the functions of consuls under established international practice * * *. The function of consuls

is to preserve derelict estates. When their countrymen die in foreign lands, it is their duty to step in and guard the stranded property from waste" (212 N. Y. at page 223).

Further confirmation of this as the only reasonable construction of the Persian treaty is found in its very wording. The notion that one's effects shall be *delivered up integrally* to his "family or partners in business" is repugnant to the basic requirement of all modern law that a decedent's property be first answerable for his debts and then distributed to his donees, subject only to such restrictions as the law of the domicile imposes. To hold that the treaty applies solely to Persian nationals *temporarily sojourning here*, as the learned surrogate below has found, not alone reconciles the convention to well settled law, but gives it a rational, if not the sole credible interpretation.

In this view of the understanding of the treaty at bar, it is not deemed necessary to comment on appellant's insistence that he is entitled to all its benefits, perforce of the "most favored nation" clause of the Italian treaty. It must be presumed that the subject was under consideration, in 1894, when our government declined to authorize Italian Consuls to settle the estates of their deceased nationals in this country. (See 212 N. Y. at page 228.)

Such conclusion accords with the decision in Rocco vs. Thompson, 223 U. S. 317, wherein this Court affirmed a California decision (157 Cal. 552) denying administration of an Italian subject's estate to the Consul General of Italy and awarding administration to the public administrator in accordance with the state law. As the Court, in its opinion, noted that in this country the right to administer property left by a foreigner within the jurisdiction of the state is primarily committed to state law. This Court concluded its opinion as follows:

"Our conclusion then, is that, if it should be conceded for this purpose that the most-favored nation clause in the Italian treaty carries the provisions of the Argentine treaty to the consuls of the Italian government in the respect contended for (a question unnecessary to decide in this case), yet there was no purpose in the Argentine treaty to take away from the states the right of local administration provided by their laws, upon the estates of decedents of a foreign country, and to commit the same to the consuls of such foreign nation, to the exclusion of those entitled to administer as provided by the local laws of the state within which such foreigner resides and leave property at the time of decease."

Administration by the public administrator in the instant case is expressly provided for and regulated by Chapter 230 of the Laws of 1898. (State of New York.) Section 14 of said statute provides for the payment of the residue of the estate, as to whom the rightful owner is unknown, into the City Treasury for the benefit of the person or persons who may thereafter be proven to be entitled thereto. This depositary is peculiar to the public administrators of New York and Bronx Counties. In other instances of unknown owners, similar deposits are directed to be made into the State treasury. (Section 272 New York Surrogate's Court Act, Laws 1914, chapter 443.) The state has therefore declared a settled policy that all personal property of persons domiciled within its borders is to remain in the state, unless directed to be paid to those next of kin who are proven to be actually entitled thereto. This right of local administration by the State of New York will be upheld by this Court, and no presumption destructive of state sovereignty will be indulged in.

POINT III.

The decree appealed from should be in all respects affirmed with costs.

Respectfully submitted,

JOHN J. BENNETT, JR.,
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